LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
OCT 7 1953
HAROLD B. WILLEY, Clerk

No. 15

In the Supreme Court of the United States

October Term, 1953

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

LOCAL UNION NO. 1229, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, (AFL), *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT

LOUIS SHERMAN
PHILIP R. COLLINS,
Attorneys for Respondent
1200 - 15th St. N.W.
Washington 5, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
I. The facts	3
II. Trial Examiner's Intermediate Report and Recommended Order	9
III. The Board's Decision and Order	10
IV. The Decision of the Court of Appeals	11
Summary of Argument	13
Argument:	
The Board's dismissal of the complaint is not in accordance with law	17
A. Concerted activities which are not in violation of law are within the scope of Section 7 unless they contravene a basic policy of the Act or of related Federal Statutes	20
B. The publication of the handbill did not contravene basic policies of the Act or of related Federal Statutes	40
Conclusion	54
Appendix A	55
Appendix B	63

AUTHORITIES CITED

CASES:

American News Company, Matter of, 55 N.L.R.B. 1302 . . . . 27, 35

American Newspaper Publishers Assoc. v. N.L.R.B. and I.T.U., 190 F. (2d) 45 2

Armour and Company, Matter of, 25 N.L.R.B. 989, 996 . . . . 23, 24

Page

Bamberger Broadcasting Company, Docket Nos. 7241, 7243, 7254, 7246, 7248 & 7250, F.C.C., 3 Pike & Fischer, Radio Regulation 1069 ..... 44, 45
Berkshire Knitting Mills, Matter of, 46 N.L.R.B. 955, 1003 ..26, 35
Casey v. *United States*, 191 F. (2d) 1; reversed on other grounds, 343 U. S. 808 39
Colgate-Palmolive Peet Co. v. *National Labor Relations Board*, 338 U. S. 355 22
Condenser Corporation, Matter of, 22 N.L.R.B. 347, enforcement denied sub nom. *N.L.R.B.* v. *Condenser Corp. of America et al.*, 128 F. (2d) 67 ..... 22, 28, 32
C. G. Conn, Ltd., Matter of, 10 N.L.R.B. 498, enforcement denied sub nom. *C. G. Conn, Ltd.* v. *N.L.R.B.*, 108 F. (2d) 390 ..... 22, 28, 31
Courier Post Broadcasting Company v. *F.C.C.*, 104 F. (2d) 213 44
Dismuke v. *United States*, 297 U. S. 167 24
Draper Corporation, Matter of, 52 N.L.R.B. 1477, enforcement denied sub nom. *N.L.R.B.* v. *Draper Corp.*, 145 F. (2d) 199 ..... 22, 30
Dyson & Sons, Inc., Matter of, 72 N.L.R.B. 445 25
Fansteel Metallurgical Corp., Matter of, 5 N.L.R.B. 930, enforcement denied sub nom. *N.L.R.B.* v. *Fansteel Metall. Corp.*, 306 U. S. 240 ..... 20, 21, 22, 25, 26, 35, 36
Harnischfeger Corp., Matter of, 9 N.L.R.B. 676, 686 ..23, 24, 28, 31
Home Beneficial Life Insurance Co., Matter of, 69 N.L.R.B. 32, enforcement denied sub nom. *Home Beneficial Life Insurance Co.* v. *N.L.R.B.*, 159 F. (2d) 280 ..... 22, 28, 32, 33
Hoover Co., Matter of, 90 N.L.R.B. 1614, enforced in part and denied in part sub nom. *Hoover Co.* v. *N.L.R.B.*, 191 F. (2d) 380 ..... 11, 12, 22, 24
Indiana Desk Co., Matter of, 58 N.L.R.B. 48 enforcement denied sub nom. *N.L.R.B.* v. *Indiana Desk Co.*, 149 F. (2d) 987 ..... 22, 28, 33, 35
KFBK v. *Federal Radio Commission*, 47 F. (2d) 670 42
Montgomery Ward Co., Matter of, 64 N.L.R.B. 432, enforcement denied sub nom. *N.L.R.B.* v. *Montgomery Ward Co.*, 157 F. (2d) 486 22
National Labor Relations Board v. *Clara-Val Packing Co.* 191 F. (2d) 556 22
National Labor Relations Board v. *Guy F. Atkinson Co.* 195 F. (2d) 141 22
National Labor Relations Board v. *Hearst Publications, Inc.* 322 U. S. 111 22
National Labor Relations Board v. *Peter Cailler Kohler Swiss Chocolate Co., Inc.* 130 F. (2d) 503 ..... 9, 15, 49, 51

Page

National Labor Relations Board v. *Rockaway News Supply Co., Inc.* 345 U. S. 71 22
National Labor Relations Board v. *Schwartz*, 146 F. (2d) 773 ..... 16, 49
Panama Refining Co. v. *Ryan*, 293 U. S. 388 ..... 14, 37, 38
Republic Aviation Corporation v. *N.L.R.B.*, 324 U. S. 793, 798 31
Sands Manufacturing Co., Matter of, 1 N.L.R.B. 546, enforcement denied sub nom. *N.L.R.B.* v. *Sands Manufacturing Co.*, 306 U. S. 332 ..... 22, 27
Schechter Corporation v. *United States*, 295 U. S. 495 ..14, 38, 39
Scullin Steel Co., Matter of, 65 N.L.R.B. 1294 35
Southern Steamship Co., Matter of, 12 N.L.R.B. 1088, enforcement denied sub nom. *Southern Steamship Co.* v. *N.L.R.B.*, 316 U. S. 31 ..... 22, 27, 35, 36
Standard Lime and Stone Co., Matter of, 5 N.L.R.B. 106, 117 25
Thompson Products Co., Matter of, 72 N.L.R.B. 886 35
United Automobile Workers v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 255-257 ..... 23, 24, 28, 31, 35
United States v. *Citizens Loan and Trust Company*, 316 U. S. 209 24
Youngstown Tire and Tube Co. v. *Sawyer*, 345 U. S. 579 39

STATUTES CITED:

Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C., Supp. V. 141, et seq.):
Section 1(b) 17, 40
National Labor Relations Act, as amended (Act of July 5, 1935, 49 Stat. 449, 29 U.S.C. 151 et seq., as amended by the Act of June 23, 1947, Public Law 101, 80th Congress, 1st Session and as further amended by the Act of October 22, 1951, Public Law 189, 82nd Congress, 1st Session, 29 U.S.C., Supp. V. 151 et seq.):
Section 7 ..... 3, 9-10, 12-22, 24-26, 28-31, 34-37, 40, 49, 51-54
Section 8(a) (1) 3, 10
Section 8(a) (3) 3
Section 8(c) 53
Section 10(c) 21, 26
Section 10(e) 2
Section 10(f) 2
Communications Act of 1934, as amended (Act of June 19, 1934, 48 Stat. 1064 et seq., 47 U.S.C. 151 et seq., as amended by the Act of June 5, 1936, 49 Stat. 1475, 47 U.S.C. 307, as amended by the Act of May 20, 1937, 50

Page

Stat. 189, 47 U.S.C. 151 et seq., and as further amended by the Act of July 15, 1952, Public Law 554, 82nd Congress, 2nd Session):

Section 1 41
Section 307(a) 16, 41
Section 307(d) 41
Section 308(b) 41

MISCELLANEOUS:

Blue Book of the Federal Communications Commission, entitled *Public Service Responsibility of Broadcast Licensees*, March 7, 1946 (with Public Notice 95462 as a Preface) 42-46
Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L.J. 319, 344 ..... 2[illegible], 27
Gregory, *Unprotected Activity and the NLRA*, 39 Va. L.R. 421 20
Legislative History of Labor Management Relations Act, 1947 ..... 34, 35, 36
Newell, *Slander and Libel*, 4th ed. 52, 53
Slichter, *Address*, 31 Labor Relations Reporter 5, 13 48

In the Supreme Court of the United States

October Term, 1953

No. 15

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

LOCAL UNION NO. 1229, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, (AFL), *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the court below (R. 265-270) which unanimously reversed the decision of the National Labor Relations Board and remanded the case for further proceedings is reported at 202 F. 2d 186.

JURISDICTION

The judgment of the court below (R. 270-271) was entered on November 20, 1952. The petition for a writ of certiorari, filed on February 17, 1953, was granted on May 4, 1953 (R. 275). The jurisdiction of this Court is invoked under 28 U.S.C.

1254, and under Section 10 (e) and (f)[1] of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the terms of Section 7 providing that "Employees shall have the right . . . to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection" may properly be construed as vesting broad power in the National Labor Relations Board to remove from the scope of such right any concerted activity which it deems "beyond the pale" or "indefensible under the circumstances" even though such concerted activity is a lawful means for a lawful object and does not contravene any basic policy of the Act or of related federal statutes.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V Secs. 151, *et seq.*) and the Communications Act of 1934, as amended (48 Stat. 1105, 47 U.S.C., Secs. 151, *et seq.*) are set forth in the Appendix, *infra*, pages 55-65.

The provisions of the National Labor Relations Act, as amended, which are most directly involved in this proceeding are as follows:

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

---

[1] See *American Newspaper Publishers Association* v. *National Labor Relations Board and International Typographical Union*, 190 F. 2d 45.

(1) To interfere with, restrain, or coerce employees in the exercise of the *rights guaranteed in section 7*;

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the *right* to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other *concerted activities for the purpose of collective bargaining or other mutual aid or protection*, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3). (Italics supplied.)

STATEMENT

I. The Facts

At the time of the events which gave rise to this case, Local Union 1229 of the International Brotherhood of Electrical Workers, AFL (hereinafter referred to as "Local 1229" or the "Union") was the duly certified collective bargaining agent of the technicians employed by the Jefferson Standard Broadcasting Company (hereinafter referred to as the "Company") which operated Radio Station WBT in Charlotte, North Carolina. Local 1229 was certified by the Board on May 9, 1949 (R. 261-262) having won the election by a vote of twelve-to-two out of a total number of

sixteen eligible voters (R. 259-260). The Union held a collective bargaining agreement covering the technicians employed at WBT since 1939. The Columbia Broadcasting System was the signatory employer until 1945 when the station was sold to the Jefferson Standard Broadcasting Company. The Company was the signatory employer after that date (R. 47, 93-94).

The negotiations for a collective bargaining agreement which resulted in the labor dispute here involved commenced in December, 1948. Through the months of November and December of 1948 and in February, 1949 the Company advertised in the newspapers for twelve technicians, the exact number of the employees voting for the Union in the certification election (R. 47). The negotiations came to an impasse on the issue of the appropriate language providing for arbitration of discharges of employees. The current agreement provided that the arbitrator was authorized to determine whether there was just cause for discharge. The Union wished to continue this language. The Company, however, insisted upon unlimited discretion as to the cause of discharge reserving the power to the arbitrator to determine only the question of whether the Company had discharged the employee for the reasons assigned by the Company for such discharge (R. 48-49). During the negotiations the Company admitted that its proposed clause could be interpreted to give it authority to "fire a man for parting his hair on the wrong side" or "for wearing a red necktie rather than a blue necktie" but

asserted that it would not exercise its discretion in this manner (R. 49).

On July 9, 1949 Local 1229 commenced peaceful picketing of the station but did not strike. The operations of the station continued without interruption during the entire period of the labor dispute. The Company did not claim that such picketing was unlawful (R. 224-225) and the Board upheld the Trial Examiner's view that Section 7 protected the picketing (R. 14, fn. 7). The placards used in the picketing which contained standard subject matter concerning the labor dispute used the words "The Technicians at Radio Station WBT" in large type (R. 246-248). The words "Radio Broadcast Technicians," in large type, were also used in addition to the Local Union number and other designations of the Union in a number of these placards (R. 49-50, 249-251). The term "technicians" is the occupational title for the employees performing the work of manual operation of the equipment at radio and television stations.

On July 14, 1949 the Company, which had previously engaged only in radio broadcasting, made its first television broadcast (R. 50). The Company acquired the privilege of operating its television station by virtue of a license issued by the Federal Communications Commission. Such licenses are granted only after a finding by the Commission that the "public interest, convenience and necessity will be served thereby" (Act, Sec. 307(a), *infra*, p. 64).

The Commission has determined that the carrying of local live programs is an essential element

of the public interest and that this is in accord with the intent of Congress in enacting the Communications Act of 1934, as amended, (*infra*, pp. 44-45). The Commission has also stated that there is a need for public criticism of program service, as well as government action, to improve such service, (*infra*, pp. 45-47).

The Company had not purchased the technical equipment needed to telecast local live studio programs or local events, such as sport contests, remote from the studio (R. 117-118). A company witness testified that additional personnel would be required if such equipment were purchased (R. 124).

There was admitted public dissatisfaction with the station's programs (R. 229, 238) and the Company itself published information showing that its programs and announcements were limited to motion picture film and slide productions (R. 234-236).

During the last seven working days of August, 1949 and the first two in September, 1949 Local 1229 authorized and distributed numerous copies of the following handbill both at the picket line before the radio and television station and at other places in the City:

"IS CHARLOTTE A SECOND-CLASS CITY?

You might think so from the kind of Television programs being presented by the Jefferson Standard Broadcasting Co. over WBTV. Have you seen one of their television programs lately? Did you know that all the

programs presented over WBTV are on film and may be from one day to five years old. There are no local programs presented by WBTV. You cannot receive the local baseball games, football games or other local events because WBTV does not have the proper equipment to make these pick-ups. Cities like New York, Boston, Philadelphia, Washington receive such programs nightly. Why doesn't the Jefferson Standard Broadcasting Company purchase the needed equipment to bring you the same type of programs enjoyed by other leading American cities? Could it be that they consider Charlotte a second-class community and only entitled to the pictures now being presented to them?

WBT TECHNICIANS"

(R. 244)

The contents of the handbill were prepared by Union officers and approved for distribution by the Executive Committee of the Local. The handbills were printed by the Union and distributed by Union pickets. (R. 15, 52, 57, 103-104).

On September 3, 1949 the Company discharged the nine union members involved in this proceeding (R. 54) who had been engaged in picketing the station and were later found by the Board to have either distributed or being responsible for the distribution of the handbill (R. 18, 52-54).

Although the hearing before the Trial Examiner of the Board did not take place until approximately one-half year after the publication of the handbill, no valid evidence was introduced by the

Company or otherwise to prove that the publication of the handbill had resulted in a loss of advertising accounts or revenues. The evidence on this point was confined to the expression of "concern" by television equipment distributors and dealers as to the effect of the handbill on their sale of sets (R. 16, 53). The evidence with respect to losses during the first four months of television operation were not proved to be due to the publication of the handbill (R. 143-144). In fact, the first portion of this four month period of loss in television operations took place prior to the publication of the handbill. Operations began in July and the handbill was not distributed until the end of August (R. 50, 168). There was no evidence to show that these losses were not the ordinary experience of television stations commencing operations or were not caused by the traditional picketing which had taken place before the publication of the handbill or were not the result of admitted public dissatisfaction with the quality of the station's programs (R. 238-240).

Local 1229 filed unfair labor practice charges against the Company on September 13, 1949 for making a mass discharge of the employees involved in this proceeding. On the basis of these charges the Regional Director of the Fifth Region issued a complaint dated January 31, 1950 against the Company alleging, among other things, that the Company had engaged in unfair labor practices in violation of Sections 8 (a) (1) and (3) and Section 7 of the Act. Hearings were held before a Trial Examiner in March and July, 1950 (R. 43-46).

II. Trial Examiner's Intermediate Report and Recommended Order

The Trial Examiner issued his intermediate report on August 21, 1950 (R. 40-90). In this report the Trial Examiner found that the Company's act of giving an "unsatisfactory" endorsement to Hicks in August, 1949, which the Federal Communications Commission disregarded, was clearly calculated to discourage any further concerted activity of the employees toward obtaining an arbitration clause suitable to them (R. 72). He also concluded that "by such conduct respondent (Company) coerced and restrained its employees in the exercise of the right of self organization and to engage in other concerted activities for purposes of collective bargaining and other mutual aid or protection in violation of Section 8 (a) (1) of the Act" (*ibid.*).

With respect to the discharges of the nine employees the Trial Examiner found such discharges to be in violation of Section 8 (a) (1) and (3) of the Act. He found on the evidence in the record and on his judgment of the credibility of the witnesses (R. 59) that the writers of the handbill honestly believed it to be true, although it was, in his judgment, slightly inaccurate (R. 58-59). He relied upon the decision of Judge Learned Hand in *National Labor Relations Board v. Peter Cailler Kohler, Swiss Chocolate Co.*, 130 F. 2d 503, in his conclusion of law that the act of publication of the handbill here in issue, although perhaps prejudicial to the employer, was, nevertheless, protected activity under Section 7 of the Act (R.

59-62, 40-41). He recommended that the discharged employees be offered reinstatement.

III. The Board's Decision and Order

The National Labor Relations Board issued its decision and order on June 26, 1950 with one member dissenting (R. 10-39). The Board agreed with the Trial Examiner that the Company had violated Section 8 (a) (1) and Section 7 of the Act by giving Hicks an "unsatisfactory rating" on his operating license from the Federal Communications Commission but overruled his recommendation on the matter of the discharges. The Board concluded that the publication of the handbill was not protected by Section 7 of the Act (R. 17). It found that the object of the publication was lawful (R. 16). The Board, although apparently critical of their qualifications, found that ". . . the employees purported to speak as experts in the interest of consumers and the public at large" (R. 16). It did not find that the statements contained in the handbill were untrue or libellous. The Board stated that "In *our judgment*, these tactics in the circumstances of this case were hardly less 'indefensible' than acts of physical sabotage" (R. 16) and ". . . without attempting to formulate a test which will decide every imaginable case involving similar questions as to the scope of Section 7, we *hold* that the employees in this case went *beyond the pale* when they published the 'second-class' handbill" (R. 17). On the basis of these rulings the Board dismissed the complaint insofar as it alleged that the Company

violated Section 8 (a) (1) and (3) of the Act by the discharges (italics supplied) (*ibid.*).

A dissenting opinion was filed by Member Murdock, who was of the view that the Trial Examiner's conclusions with respect to the discharges should be accepted by the Board (R. 25-37). He adverted to the fact that the majority did not deny the substantial accuracy of the handbill and that those who drafted and distributed it on the picket line and elsewhere believed it to be true. He interpreted the decisions of the courts to lay down the rule that concerted activity such as is involved in this case loses its protection only if it is "unlawful." He further concluded that there was nothing unlawful in either the publication of the handbill or its objective. He said that the employees in this case "did no more than to point out to the public what in large measure they already knew—that the Employer's TV programs consisted largely of canned film of varying degrees of antiquity with no live local talent as in other cities; and to incite a demand for better programs and the equipment which would make them possible. Unlike the activity held protected in the *Hoover* case, this handbill did not and could not result in any present financial loss to the Respondent" (R. 35).

IV. The Decision of the Court of Appeals

Local 1229 filed a petition for review under Section 10 (f) of the Act with the court below to review and modify the Board's order insofar as it dismissed the allegations of the complaint relating to the discharges (R. 1-7). The court

below recognized that the broad language of Section 7 which assures employees the "right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid and protection" does not cover all concerted activities which are within the literal scope of this language (R. 267). As illustrations of activities excluded from the scope of Section 7, the court noted concerted activities expressly forbidden by the amended Act and also concerted activities involving the use of "unlawful means" as, for example, "A strike in contravention of the purpose of the Act" (*ibid.*). The court defined the area withdrawn from the scope of the quoted language of Section 7 as "Those concerted activities which contravene either; (a) specific provisions *or basic policies of the Act or of related federal statutes*, or (b) specific rules of other federal or local law, that is [are] not incompatible with the Board's governing statute (id.). (Italics supplied) The court went on to say that conduct thus protected under Section 7 is "lawful" conduct. The court's opinion approved a statement by the Board in the *Hoover Company* case, 90 NLRB, 1614, 1621 that the Board is "not free . . . to measure concerted activity in terms of whether the conduct is *wise* or *fair* or satisfies *standards which we* [*the Board*] *think desirable*" (R. 268). (Italics supplied.)

It was in this sense of the court's definition of "lawful" and "unlawful" conduct that the court stated that the Board had failed to make an appropriate determination of the legality or illegality of the use of the handbill. In particular, the court

stated that "by giving 'indefensible' a vague content different from 'unlawful' the Board misconceived the scope of the established rule" (R. 268).

The court denied the Union's petition for modification and enforcement of that part of the order involved in this proceeding and remanded the case to the Board for "further proceedings not inconsistent with this opinion." The Court of Appeals took the position that "sound practice in judicial review of administrative orders precludes this court from determining 'unlawfulness' without a prior consideration and finding by the Board" (R. 269-270).

SUMMARY OF ARGUMENT

I

Section 7 of the Act guarantees employees "the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." There is no express term in the Act providing exceptions from the scope of this language. Nor does the Act expressly delegate authority to the National Labor Relations Board to make exceptions.

The current of judicial decisions, however, has established the rule that concerted activities inconsistent with specific provisions of Federal or State law not incompatible with the Act, or the basic policies of the Act or of related Federal statutes, are not within the scope of Section 7. The Board contends that it has a power "in addition" to deny protection to concerted activities which it deems "indefensible under the circumstances" (Pet. br. 26).

The Board's assumption of administrative

power not limited by statutory provisions or even the policies of this Act or of related Federal statutes has no foundation in law. The actual history of litigation under Section 7 shows an almost uniform refusal on the part of this Court and the courts of appeals to accept the administrative judgment of the Board in similar Section 7 cases. The decisions of this Court and the decisions of the courts of appeals, to the extent that such decisions of the courts of appeals are valid, are based on the principle that concerted activities which are not in violation of specific provisions of law, lose the protection of Section 7 if they contravene the purposes or policies of this Act or of related Federal statutes. The legislative history of the 1947 amendments approves these decisions. The language chosen by the draftsmen of the House Conference Report to state that "unlawful or other improper conduct" is not within the protection of Section 7 must be read in the light of these decisions. If the words "other improper conduct", which were not enacted into law, require a statutory construction of Section 7 to provide the unlimited administrative discretion contended for by the Board then serious questions of constitutionality would be raised.

This Court has ruled that legislative power may not be delegated even to the President of the United States. *Panama Refining Co. v. Ryan*, 293 U.S. 388; *Schechter Corp. v. United States*, 295 U.S. 495. Administrative power must be exercised within the limit of adequate and definite standards. Under the Constitution the Board cannot be given a "roving commission" to find con-

certed activities "beyond the pale" or "indefensible under the circumstances". The fact is, however, that Congress did not grant such unlimited authority to the Board in Section 7 cases and the Courts have decisively repudiated the claims of the Board in this regard.

II

In the instant case the employees, during the course of a labor dispute, published a handbill stating with substantial accuracy the fact that the employer did not have equipment available to produce live local television programs. The Board found the purpose of publication lawful. It also found there was no wilful misrepresentation in the handbill and approved, because it did not modify, the finding of the Trial Examiner that there is no evidence to show that the employees intended maliciously to injure the employer's business (R. 11, 58-59).

Section 7 of the Act protects union publications made for the purpose of winning the favor of the public on a non-labor issue in order that the union may acquire the support of public opinion in its labor disputes (*NLRB v. Peter Cailler Kohler*, 130 Fed 2. 503 (C.A. 2)). The Board in its decision recognized that "the employees purported to speak as experts, *in the interest of the consumers and the public at large*" (R. 16). This was indeed the actual case. The employer acquired the privilege of operating a television station by virtue of a license issued by the Federal Communications Commission upon the basis of a finding required by the Communications Act of 1934 as amended,

that "the public interest, convenience and necessity will be served thereby" (Sec. 307 (a), *infra*, p. 64). The Commission has determined that it is the Congressional objective of the Communications Act to make the character and quality of program service a factor in determining whether a licensee is operating in the public interest. The Commission has also found that the carrying of local live programs is a necessary ingredient of adequate program service (*infra*, pp. 41-45).

The union publication of the fact that the company did not carry such local live programs was therefore in the public interest, particularly since the Commission has stated there is a need for public criticism as well as government action to improve program service. The union publication could only have the effect of accelerating the employer's improvement of his programs (*infra*, pp. 45-47). This was in the public interest and the Board's conclusion that such publication was "hardly less indefensible than acts of physical sabotage" is without foundation in reason or law.

The circumstances related by the Board in support of its conclusion are irrelevant to the policies of this Act. Publication of the handbill over the occupational title of the employees i.e. "WBT Technicians" was as valid as publication over the name of the local union, its number and affiliation. Section 7 protects the right of "employees" and is not limited to labor organizations (*NLRB v. Schwartz*, 146 F. 2d 773, 774 (C.A. 5)). Certainly such a minor procedural regulation of union activity cannot be inferred from the policies of the Act. Nor can there be inferred from such statutory

policies a test limited to the "expectable reaction" of an employer. Section 1(b) of the Act makes it clear that the rights of both employers and employees are accorded within the scope of "the general welfare" and the "public interest".

The public policy of the United States is to protect freedom of speech. This policy is found in the Constitution, at common law and indeed in this very Act. The decision of the Board would encourage the suppression of opinion on matters of public interest if employees are the source of that opinion. This, unlike the maintenance of discipline in the process of production, is not an essential element of a balanced society.

The concerted activity of publication of the handbill did not contravene any policy of this Act or of related Federal statutes. It is therefore protected by Section 7. *A fortiori* the court below did not commit error in remanding the case to the Board for further proceedings in accordance with the Court's legal interpretation of Section 7.

ARGUMENT

The Board's Dismissal of the Complaint Is Not In Accordance With Law

Section 7 of the Act guarantees the rights of employees to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. There is no express exception to the scope of this language in the statute.

The current of judicial decisions on the scope of Section 7, however, has clearly established the rule that certain labor activities covered by the literal language of Section 7 are nevertheless not

within its scope. Concerted activities within the literal language of Section 7 may be excludable either because of their object or because of the means used to accomplish the object.

In the instant case, no question is raised with respect to the object of the concerted activity of publication of the handbill because the Board found the purpose of such activity to be lawful (R. 16).

The issue is therefore confined to the question of the status under Section 7 of the means used to accomplish a lawful object.

The Board recognizes that the means used in the instant case were not independently unlawful. Respondent concedes for the purpose of this argument that there is an area of exception from the protection of Section 7 of concerted activities for a lawful object, even though the means used are not independently unlawful. The controversy in the instant case is over the standards which are to be applied in determining which concerted activities in this latter area are removed from the protection of Section 7.

This case does not raise the issue of whether *all* concerted activities for mutual aid or protection are within the scope of Section 7. Nor does it raise the issue of whether the sole exception to the literal scope of Section 7 is limited to concerted activities which are independently in violation of state or federal law.

The court below did not rest its decision on either of these propositions. Its decision rests

upon the proposition that concerted activities (for a lawful object) which are not in violation of Federal or State law, are protected by Section 7 unless such concerted activities contravene basic policies of the Act or of related Federal statutes. The court below used the phrase "lawful conduct" to apply to conduct which satisfies this test (R. 267-268). It used the word "unlawfulness" to apply to conduct which, although not independently in violation of specific Federal or State law, nevertheless contravenes a basic policy of the Act or of related Federal statutes. And it was this very question of "unlawfulness" which was remanded by the court of appeals to the Board for further proceedings (R. 269-270).

The Board, in its brief and in its decision, has taken the position that the applicable standard is its own informed judgment of whether the concerted activity is "indefensible" under the circumstances, or, "beyond the pale".

Respondent contends the Board's position amounts to an unfounded request for judicial validation of its exercise of discretion, without ascertainable or reviewable limit, to remove from Section 7 concerted activities which are not independently unlawful.

It is the contention of the Respondent that such concerted activities, (i.e. for a lawful object and not independently unlawful) are not removed from the scope of Section 7 unless a valid determination has been made that they contravene a basic policy of the Act or of related Federal statutes.

A. Concerted Activities Which are Not In Violation Of Law are Within the Scope of Section 7 Unless They Contravene a Basic Policy of the Act or of Related Federal Statutes.

1. The language of the Board, in its decision and brief, shows on its face that the Board is seeking to delegate to itself unlimited administrative discretion in the interpretation of rights guaranteed by Section 7.[2]

The Board's holding that the employees in this case "went beyond the pale" in publishing the handbill is based on a standard which is empty of meaning. The word "pale" implies the notion of a circumference but there is no basis, other than the personal views of the Board members to determine the location of the circumference or even the considerations which determine the area in which this circumference may be expanded or contracted. If approved, this "test" would amount to the establishment of the rule of *ipse dixit* in determining

---

[2] The author of an article entitled *"Unprotected Activity and the NLRA,* 39 Va. Law Rev. 421 (May 1953) recognizes that a major ground of his support of the Board's position in the instant case is his view that the disposition of the *Fansteel* case "really was a matter *wholly for the Board's discretion.*" (at p. 427). Furthermore, in a phrase reminiscent of an interesting field somewhat removed from the law, he opines that "several hundred labor arbitrators can't be wrong" but fails to distinguish the difference between questions of discharge arising under a collective bargaining agreement and questions of retaliatory discharges interfering with protected concerted activity which arise under Sections 8(a)(1) and (3) and Section 7 of the Act. See 3 CCH Law Journal 89, 92-93; 60 Yale L.J. 529.

the scope of Section 7 of the statute. Such a rule is certainly not in accord with legal process.

The Board's opinion, also states that in the judgment of the majority the tactics of the employees "in the circumstances of this case, were hardly less 'indefensible' than acts of physical sabotage" (R. 16). It is respectfully submitted that this standard on its face is unreasonable; nor does it have a foundation in law. Physical sabotage is a public wrong creating serious danger to life and property. It is a crime, the commission of which rightly exposes the wrongdoer to heavy punishment, including long sentences of imprisonment, regardless of the motive for the criminal action. The publication of a handbill in the interest of consumers and the public is the very opposite of a public wrong. It is not a crime nor is it a tort.

The actual history of litigation decisively repudiates the idea that Congress intended to vest a large reservoir of administrative discretion in the Board to interpret the scope of Section 7.

In the 14 years which have elapsed since the decision of this Court in *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (Feb. 27, 1939), the administrative judgments of the Board on the scope of Section 7, and indeed of Section 10(c), have generally not been accepted by either this Court or the courts of appeals.[3] See Cox, "*The Right to Engage in Concerted Activities*", 26 Ind. L. J. 319, 344, where it is stated that the courts

---

[3] Among the cases cited by the Board in its brief in which the Courts did not accept the administrative judg-

have shown no tendency to defer to the National Labor Relations Board in Section 7 cases and that *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, upon which petitioner's brief relies (p. 19), has not been cited in any of the opinions in which the Board's application of Section 7 has been reviewed

---

ment on the scope of protected concerted activity are the following:

C. G. Conn Ltd., 10 NLRB 498 (Dec. 18, 1938) *enf. denied*, 108 F. 2d 390 (C. A. 7) (Dec. 22, 1939).

Condenser Corp., 22 NLRB 347, 430-431 (March 29, 1940) *enf. den.* 128 F. 2d 67 (C. A. 3) (March 25, 1942)

Draper Corp., 52 NLRB 1477 (Oct. 20, 1943) *enf. denied*, 145 F. 2d 199 (C. A. 4) (Oct. 6, 1944)

Fansteel Metallurgical Corp., 5 NLRB 930 (March 14, 1938) *enf. denied*, 306 U. S. 240 (Feb. 27, 1939)

Home Beneficial Life Ins. Co., 69 NLRB 32 (June 26, 1946) *enf. denied*, 159 F. 2d 28 (C. A. 4) (Jan. 7, 1947)

Indiana Desk Co., 58 NLRB 48 (Sept. 4, 1944) *enf. denied*, 149 F. 2d 987 (C. A. 7) (June 15, 1945)

Montgomery Ward Co., 64 NLRB 432 (Oct. 24, 1945) *enf. denied*, 157 F. 2d 486 (C. A. 8) (Oct. 23, 1946)

Sands Mfg. Co., 1 NLRB 546 (April 17, 1936) *enf. denied*, 306 U. S. 332 (Feb. 27, 1939)

Southern Steamship Co., 12 NLRB 1088 (May 18, 1939) *enf. denied*, 316 U. S. 31 (April 6, 1942)

See *Hoover Co.* v. *National Labor Relations Board*, 191 F. 2d 380 (C. A. 6) (July 9, 1951)

cf. *Colgate-Palmolive Peet Co.* v. *National Labor Relations Board*, 338 U. S. 355 (Dec. 5, 1949)

National Labor Relations Board v. *Rockaway News Supply Co., Inc.*, 345 U. S. 71 (March 9, 1953)

National Labor Relations Board v. *Clara-Val Packing Co.*, 191 F. 2d 556 (C. A. 9) (August 30, 1951)

National Labor Relations Board v. *Guy F. Atkinson Co.*, 195 F. 2d 141 (C. A. 9) (February 29, 1952)

by the courts of appeals. See *UAW v. Wisconsin Employment Relations Board*, 336 U.S. 245, 255-257.

Nor is there any basis for the Board's contention (Pet. br. 26) that both the Board and the courts of appeals have been applying the same test of "indefensibility" used in this case, since early in the history of the Wagner Act. The Board in its brief (pp. 26-27) places heavy emphasis on the declaration in *Harnischfeger Corp.*, 9 NLRB 676, at p. 686 (Nov. 8, 1938) which was reiterated in *Armour and Co.*, 25 NLRB 989, at p. 996 July 27, 1940) that:

> "Section 7 of the Act expressly guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. We do not interpret this to mean that it is unlawful for an employer to discharge an employee for *any* activity sanctioned by a union or otherwise in the nature of collective activity. The question before us is, we think, whether this particular activity was so indefensible, under the circumstances, as to warrant [the employer] under the Act, in discharging the [employees] for this type of union activity."

It is respectfully submitted that the Board's use in the instant case of the identical word "indefensible" or the identical phrase "under the circumstances" which appeared in its decision 15 years ago in the *Harnischfeger Corporation* case, *supra*, is not the equivalent of a uniform and con-

sistent administrative construction of a statute over a long period of time. See *United States v. Citizens Loan and Trust Company*, 316 U.S. 209, *Dismuke v. U. S.* 297 U. S. 167. Board interpretations of the scope of Section 7 of the Act have been consistently rejected by this Court and the Courts of Appeals (*supra*, pp. 21-23). The very cases relied upon by the Board in its brief (pp. 27-28) to show that the Courts of Appeals under the Wagner Act have applied a holding "similar" to that contended for by the Board are cases in which the Courts of Appeals have not accepted the Board's administrative construction of Section 7 of the statute (p. 27). Indeed, the decision of this Court in *United Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245, makes it clear that this Court does not consider itself bound by the administrative decisions of the Board on the scope of Section 7, (*ibid.*) (at pp. 255-257).

There has, in fact, been no settled interpretation by the Board of the meaning of its phrase "indefensible under the circumstances". Cf. *Hoover Co.*, 90 NLRB 1614, 1621 and R. 30-31.

In the instant case the phrase "indefensible under the circumstances" is used to deny the protection of Section 7 to the expression of fair comment on a matter of public interest. In *Harnischfeger Corporation*, *supra* and *Armour Company*, *supra* the Board considered it *defensible* to extend the protection of Section 7 to concerted refusals to work overtime and to engage in a partial interruption of production. Originally the Board applied this, or a similar test, to distinguish between major and minor crimes. For example, in

Standard Lime and Stone Company, 5 NLRB 106, 117 (Feb. 4, 1938), the Board refused reinstatement to employees who were given maximum sentences of ten years in the state penitentiary but ordered reinstatement of employees who were sentenced to serve six months imprisonment for conviction of the misdemeanor for conspiring to destroy property. The Board's position that *some* concerted activities are outside the scope of Section 7 was given the following meaning in its decision in *Fansteel Metallurgical Corporation*, 5 NLRB 930, 950 (March 14, 1938) (sit down strike involving trespass and violation of injunction):

> "We have, in some cases, declined to order reinstatement of striking employees despite the fact that the strike was caused by the employer's unfair labor practices. In one such case, the striker in question had been indicted for shooting and wounding a fellow employee during the course of a strike. In another, six strikers had pleaded guilty to a felony involving conspiracy to destroy property, and two had pleaded guilty to the felony of stealing dynamite and converting it to their own use; all eight had been sentenced to a maximum of ten years in jail. It cannot be said that the conduct of the strikers in the present case is analogous to the conduct in those instances. They were not engaged in sabotage. *Under the circumstances*, we do not feel that the respondent's contention should prevail." (Italics supplied)

A distinction between major and minor crimes was made by the Board in *Berkshire Knitting Mills*, 46 NLRB 955, 1003 (Jan. 12, 1943).

It is submitted that the consideration of the applicable rules of law are governed not by the accidental similarity of Board terminology but by the language of the statute, the decisions of the courts and the legislative history of the Act.

2. The applicable judicial decisions support the view that the discretion of the Board in Section 7 cases is limited by the policies of the Act.

This Court has not established a rule vesting unlimited and indefinable discretion in the Board to remove concerted activities from the protection of Section 7. In *NLRB v. Fansteel Metallurgical Corp.*, 306 U. S. 240, the Court had before it the question of the scope of Section 10(c) which authorizes the Board to issue remedial orders in unfair labor practice cases requiring the violator "to take such affirmative action . . . as will effectuate the policies of the Act." Although this section specifically vests discretion in the Board, as distinguished from the language of Section 7 which "guarantees" the "rights" of employees, the Court ruled that "The authority to require affirmative action to 'effectuate the policies' of the Act is broad but is not unlimited. It has the essential *limitations* which inhere in the very *policies* of the Act which the Board invokes" (*id.* at p. 257). The Court also stated that "There is not a line in the statute to warrant the conclusion that it is any part of the *policies of the Act* to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the *pur-*

pose of the Act is to promote peaceful settlement of disputes by providing legal remedies for the invasion of the employees' rights" (*id.* at pp. 257-258).

As noted by the court below, the concerted action in breach of a collective bargaining agreement which was involved in *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 344, contravened a purpose of the Act (R. 267). See Cox, *"The Right to Engage In Concerted Activities"*, 26 Indiana L.J. 328-329. In *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (concerted activity found to be in violation of the mutiny sections of the Criminal Code) this Court established the rule that "Congressional objectives" set forth in statutes other than the Act must also be taken into account by the Board in exercising its administrative power of reinstatement.

The Board cites two of the above cases *i.e. Southern Steamship Co. v. National Labor Relations Board, supra* and *National Labor Relations Board v. Sands Mfg. Co., supra*, together with *American News Company*, 55 NLRB 1302, in support of the proposition that "Under the Wagner Act both (sic) the Board and the courts had held that concerted activities inconsistent with the express provisions of the *basic policy* of the Act or of some related federal statutes were not within the statutory protection." (Pet. br. 26)

It is the view of the Board, however, that there is an *additional* area which is committed to its discretion, the exercise of which is limited by the phrase "indefensible under the circumstances" (*ibid.*). The Board relies upon the opinion of this Court in *United Automobile Workers v. Wiscon-*

sin Employment Relations Board, supra, in which reference was made to the Board's terminology of "indefensibility" in *Harnischefeger Corporation*, 9 NLRB 676, and the dictum stating agreement with certain decisions of the Courts of Appeals (*C. G. Conn Ltd. v. National Labor Relations Board*, 108 F. 2, 390 (C.A. 7), *National Labor Relations Board v. Condenser Corporation*, 128 F. 2, 67 (C.A. 3), *Home Beneficial Life Insurance Co. v. National Labor Relations Board*, 159 F. 2, 199 (C.A. 4) and *National Labor Relations Board v. Indiana Desk Co.*, 149 F. 2, 987 (C.A. 7)) to support its position calling for the vesting of broad administrative discretion in it to remove so-called "indefensible" activities from the protection of Sec. 7. It is respectfully submitted that the decision of this Court in *United Automobile Workers v. Wisconsin Employment Relations Board, supra*, does not support the claims of the Board for an "additional" area of administrative discretion.

In the first place, this Court cited the terminology employing the word "indefensible" in *Harnischfeger* for the purpose of making it clear that a finding that employees' activities are concerted does not necessarily call for a conclusion that such activities are protected by Section 7 (*supra* at pp. 256-257). It should be noted that the precise issue before this Court in the UAW case was the question of whether a state law forbidding partial strikes conflicted with the National Labor Relations Act. This Court adopted the view that the decisions of the Board holding partial strikes protected under Section 7 did not amount to an interpretation that "all work stoppages are federal

protected concerted activities" (*supra* at p. 255). The Court also pointed out in considering the question of preemption that the state law did not deal with the legal status of the "drastic remedy of discharge" which is involved in the National Labor Relations Act. There is nothing in the use by the Court of the quotation from the *Harnischfeger* decision of the Board to support the breadth of administrative discretion contended for by the Board in this case.

Furthermore, it does not follow from the dictum of this Court stating agreement with the above cited decision of the Courts of Appeals that the Courts of Appeals in those cases recognized a broad administrative discretion of the Board to define the scope of Section 7 without relationship to the basic policies of the Act or related Federal statutes. The error in the Board's position in this regard is demonstrated most clearly by the fact that in each of the decisions of the Courts of Appeals as to which this Court stated its agreement, the Courts of Appeals did not accept the administrative judgment of the Board in determining the legal scope of concerted activities under Section 7 of the Act.

Analysis of these decisions of the Courts of Appeals will also show, Respondent contends, that the courts' decisions are consistent with judicial statements as to the importance of the policies of the Act in determining Section 7 questions. Thus, the Court of Appeals for the Fourth Circuit—in holding that a "wildcat" strike of a minority of employees without authorization or sanction of the union which was chosen as the

bargaining representative was not protected by Section 7—stated the basis upon which it placed limits on the protection of Section 7 in the following language:

> ". . . we are of opinion that the 'wildcat' strike in which the employees were engaged and for which they were discharged was not such concerted activity as falls within the protection of Section 7 of the NLRA but a *strike in violation of the purposes of the Act* by a minority group of employees in an effort to interfere with the collective bargaining by the duly authorized bargaining agent selected by all the employees. The purpose of the Act was not to guarantee employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace. * * *
>
> "It is perfectly clear not only that the 'wildcat' strike is a particularly harmful and demoralizing form of industrial strife and unrest, the necessary effect of which is to burden and obstruct commerce, but also that it is necessarily destructive of that collective bargaining which it is the purpose of the Act to promote." *National Labor Relations Board v. Draper Corp.*, *supra*, at pp. 202-203.

It can reasonably be inferred from the basic concern of the National Labor Relations Act with the promotion of the "flow of commerce" that the maintenance of reasonable discipline in the system of production is within the scope of the policies

of the Act (Sec. 1). As stated by this Court in *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 798, "Opportunity to organize and proper discipline are both essential elements in a balanced society."

Although there may be differences of point of view as to the correctness of the decisions of the Courts of Appeals cited in the dictum in this Court in the *UAW* case, it will be seen that each of these cases involved a decision holding that the protection of Section 7 is withdrawn because of the conflict of the concerted activity with the necessity for the maintenance of discipline in the process of production. Thus in the *Conn Ltd.* case, *supra*, the Court held concerted refusal to work overtime during the course of a labor dispute not protected by Section 7. (It may be noted parenthetically that this is the same conduct held protected by the Board in *Harnischfeger*.) The Court stated that "We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what is sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had the right to fix the hours of their employment, it would follow that the same right existed by which they could prescribe all conditions and regulations affecting their employment" (*supra* at p. 397).

Although the Court made no explicit reference to the policies of the Act, it can be inferred that

the above statement is consistent with a conclusion that the unilateral determination of terms and conditions by employees contravenes the policy of collective bargaining which is a main purpose of the Act. A similar decision was made in the *Condenser Corp.* case where the Court denied enforcement of a reinstatement order applicable to an employee who was discharged because he and other employees refused to work after the noon recess until their demands were met although the employees had agreed to discuss the matter at the end of the day. In the *Home Beneficial Life Insurance Co. case*, life insurance agents handling group insurance collections and claims demanded modification of a company rule requiring them to report to the office five mornings per week before they set out on the day's work. The agents wished to report only two days per week. The company discharged agents who did not report pursuant to the rule. The Court of Appeals enforced a reinstatement order for those agents who struck and denied enforcement with respect to those agents who continued to work but refused to report to work in accordance with the rule. The Court stated the views upon which it proceeded as follows:

> "... the statute (Sec. 7) expressly recognizes the right of employees to engage in concerted activities but does not and could not confer upon them the right to engage *en masse* in unlawful activities, or, to defy the authority of the employer to manage his business while remaining in his service. When they engage

in an unlawful sit-down strike, as in *NLRB v. Fansteel*, 306, U.S. 240, 254, they may be discharged by an employer, even though he has been guilty of unfair labor practices; and when, as here, they refuse to obey the rules laid down by a law-abiding management for the conduct of the business, they may be discharged . . ." (at p. 284).

In the *Indiana Desk Co.* case, *supra*, the Court refused to enforce an order requiring reinstatement of employees who went on strike to secure demands which were in violation of the Wage Stabilization Act.

It also considered mass picketing "unlawful" (*supra* at p. 995) because "the picketing was designed and maintained for the avowed purpose of forceably excluding any and all employees from entering respondent's plant and . . . the pickets were prepared to use any force necessary to accomplish such purpose:" (*id.*)

It is respectfully submitted that the above decisions of the Courts of Appeals holding unprotected concerted activity in violation of company work rules during work hours do not stand for the proposition that the National Labor Relations Board is vested with such unlimited administrative discretion to condemn so-called "indefensible" conduct as would include fair comment by employees on a matter of public interest published during off duty hours.

The Board seeks to "bolster" its view concerning the scope of its administrative discretion to condemn "indefensible" concerted activities by

citing the legislative history of Section 7 of the amended Act (Pet. br. pp. 24-26). Respondent contends that this legislative history does not furnish the support claimed by the Board.

The House passed a bill which proposed the amendment of Section 7 to read as follows:

> "Employees shall have the right to self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities (*not constituting unfair labor practices under Sec. 8(b), unlawful concerted activities under Sec 12, or violations of collective bargaining agreements*) for the purpose of collective bargaining or other mutual aid or protection . . ." (*Legislative History of Labor Management Relations Act, 1947*, p. 176).

The conference agreement deleted the proposed amendment, which is italicized above, for two stated reasons: (1) the amendment was unnecessary because "the courts have firmly established the rule that under the existing provisions of Section 7 of the National Labor Relations Act employees are not given any right to engage in unlawful, or other improper conduct (House Conference Report 510 on H. R. 3020, 80th Cong. 1st Sess. pp. 38-39; *Legislative History of Labor Management Relations Act, 1947*, pp. 542-543), and (2) "There was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically

mentioned subject to the protection of the Act," *id.* p. 543.

These statements support the position of this Court in *United Automobile Workers v. Wisconsin Employment Board, supra* at p. 260, that "Congress has concurred in the view that neither Section 7 nor Section 13 confers absolute right to engage in every kind of strike or other concerted activity . . ." They do not support the position that Congress intended to vest administrative discretion in the Board to proscribe any concerted activity which the Board might deem "improper." The cases cited or referred to in the House Conference Report as establishing the rules which made unnecessary further change in the language of Section 7 are *Fansteel, supra, Southern Steamship Co., supra, Indiana Desk Co., supra,* Matter of *Berkshire Knitting Mills, supra, American News Co.*, 55 NLRB 1302, where the Board held that employees had no right which was protected under the Act to strike to compel the employer to violate the Wage Stabilization laws; *Scullin Steel*, 65 NLRB 1294, and *Dyson*, 72 NLRB 445, in which the Board held that strikes in violation of collective bargaining agreements were not concerted activities protected by the Act; and *Thompson Products Co.*, 72 NLRB 886 in which the Board held that a strike for the purpose of compelling the employer to violate a certification of bargaining representatives issued by the Board was unprotected. The Conference Committee also noted its satisfaction in the fact that the reasoning of the Board in the referred to decisions appeared to have ruled *Berkshire Knitting Mills, supra,*

where the Board attempted to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement. Reference to the Committee Report will show that the above cited cases were quoted in support of the view of the Conference Committee that the Board was consistently applying the principles established by the Courts that "employees are not given any right to engage in *unlawful or other improper conduct*," *id.* pp. 542-543.

It is these cases which give content to the meaning of the words "unlawful or other improper conduct." Therefore, in the context of the statements in the Conference Report the words "other improper conduct" are given full meaning when applied to cases of concerted activities which although not specifically unlawful in the sense of the term as used in *Fansteel* or *Southern Steamship Co.*, were nevertheless improper because of their objectives which were not consistent with the basic policies of the Act or of related Federal statutes.

In any event, the words "improper conduct" used by the draftsmen of the Conference Committee Report cannot be extended to mean that any conduct not specifically enumerated in the deleted House amendment may be condemned and removed from the protection of Section 7 of the Act by a determination of the Board that such conduct is "improper". Furthermore, legislative history may be useful in determining the intent of specific language which has been enacted by the Congress;

it is not a proper basis for writing words into the Act which were not adopted by the Congress.

4. If the legislative history of the Act or the decision of the Courts of Appeals relied upon by the Board in its brief establish the proposition that the Board is vested with the discretion which it claims, then the application of Section 7 would raise constitutional questions.

It is fundamental that legislative power cannot be delegated to the executive department or administrative agencies of government. There must be an adequate standard specified upon the basis of which the executive or administrative is to perform its functions. This Court has refused to make an exception to this constitutional rule even for the President of the United States. *Panama Refining Co. v. Ryan*, 293 U. S. 388. In that case, Sec. 9(c) of the National Industrial Recovery Act authorized the President to prohibit the transportation of hot oil in interstate commerce. There was no standard stated to determine when he would exercise this power and the Court took the view that the statement of policy in the Act contained nothing as to the circumstances in which the transportation of hot oil should be prohibited by the President. The Court said in language which runs counter to the position of the Board in the instant case that "the effort by ingenious and diligent construction to supply a criterion still permits such a breadth of authorized action as essentially to commit to the President the functions of a legislature rather than those of an executive or administrative officer executing a declared legisla-

tive policy" at pp. 418-419. The Court also stated that:

> "The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motive but of constitutional authority, for which the best of motives is not a substitute." (*ibid.* at p. 420)

In *Schechter Corp. v. United States*, 295 U.S. 495, the Court held that the legislative terminology of "fair competition" was an illusory standard not sufficient to save the National Industrial Recovery Act from being declared unconstitutional on the ground that it delegated legislative power to the executive. Chief Justice Hughes analyzed the term in the following language:

> "What is meant by 'fair competition' as the term is used in the Act? Does it refer to a category established in the law and is there authority to make codes limited accordingly? Or is it used as a convenient designation for whatever set of laws the formulators of a code for a particular trade or industry may propose and the President may approve (subject to certain restrictions) or the President may himself prescribe, as being wise and beneficent provisions for the government of the trade or industry in order to accomplish the broad purposes of rehabilitation, correction

and expansion which are stated in the first section of Title I.

"The Act does not define 'fair competition'. 'Unfair competition' as known to the common law, is a limited concept." (*supra* at p. 531)

Justice Cardozo, in a concurring opinion, stated that: "The delegated power of legislation which has found expression in this Code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant . . . Here in effect is a roving commission to inquire into evils and upon discovery, correct them" (*supra*, p. 551).

See also *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U. S. 579. cf. *Casey v. United States*, 191 F. 2d 1 (C.A. 9) reversed on other grounds, 343 U.S. 808.

It may be said that the subject of power which the Board claims has been delegated to it by the Congress in the instant case is of a lesser degree of importance than the subjects of delegation involved in the above cases. It is respectfully submitted however, that, if so, the principles of constitutional government and due process of law are equally applicable. The concept of limitation of administrative power cannot be disregarded because the area of variation from such concept is deemed "modest and obviously sensible" by the administrative agency concerned (Pet. br. 1f). Since it is the standard rule of construction to interpret a statute in such manner as to avoid constitutional questions, it is submitted that the "roving commission" claimed by the Board for the definition of concerted activities which are "indefensi-

ble under the circumstances" or "beyond the pale" has no foundation in this Act or law.

B. The Publication of the Handbill Did Not Contravene Basic Policies of the Act or of Related Federal Statutes

If then the National Labor Relations Board has not been given a "roving commission" to remove concerted activities, not independently unlawful, from the protection of Section 7, the limits on the Board's power must be found not "in the circumstances" but in the purposes and policies of the Act and in the Congressional objectives of the Act or of related Federal statutes.

It is respectfully submitted that the Congressional statement of its purposes and policies in the Act does not support the view that the Board was authorized to make determinations on the basis of private rights. The Board was authorized to adjudicate such rights on the basis of public policy and interest. Nor was the Board authorized to engage in a fictional process of striking a physical or quantitative balance of employer and employee rights. When such rights come into conflict, the decision as to which shall prevail must turn on the effect of the decision on the public interest.

The first paragraph of the "Declaration of Policy" of the Labor-Management Relations Act, 1947 (Section 1(b)) calls upon employers, employees and labor organizations to recognize "*under law*" one another's legitimate rights in their relations with each other, "and *above all* recognize *under law* that neither party has any right in its relations with any other to engage in acts or practices which

jeopardize the *public health, safety or interest.*"

The second paragraph of Section 1(b) provides that it is a "purpose and policy" of the Act "to define and proscribe practices on the part of labor and management which affect commerce and are *inimical to the general welfare*, and to *protect the rights of the public* in connection with labor disputes affecting commerce."

The question is therefore presented by this aspect of the case as to whether the concerted activity here involved was inimical to the general welfare or the public interest.

This inquiry must take as its starting point the fact that the Company was operating a television station by virtue of a license granted by the Federal Communications Commission under the Communications Act of 1934. The purpose of that Act is to provide ". . . a rapid, efficient, nationwide and worldwide *wire* and radio communication service with adequate facilities . . ." (Communications Act, Sec. 1, *infra*, p. 63).

Station licenses are issued only after a finding by the Commission that "the public convenience, necessity or interest will be served thereby" (Sec. 307(a), *infra*, p. 64). Licensees hold their rights to operate for the temporary period of three years and after the expiration of such period renewal is granted only if an affirmative finding is made that such renewal would serve the "public convenience, necessity or interest" (Sec. 307(d), *infra*, pp. 64-65). The Commission is authorized by the Act to revoke the license even during the period of its temporary duration (Sec. 308(b), *infra*, p. 65).

It is clear that Congress determined that the

adequacy of program service was an integral part of the public interest in the telecasting industry. See *KFBK Broadcasting Association v. Federal Radio Commission*, 47 F. 2d 670 (C.A., D. C.).

> "It is apparent, we think, that the [radio] business is impressed with a public interest and that, because the number of available broadcasting frequencies is limited, the Commission is necessarily called upon to consider the character and quality of the service to be rendered."

The Federal Communications Commission has stated in its Blue Book entitled "*Public Service Responsibility of Broadcast Licensees*", which is equally applicable to television, that

> "On the basis of the . . . legislative history there can be no doubt that Congress intended the Commission to consider overall program service in passing on applications. The Federal Communications Commission from the beginning accepted the doctrine that its public interest determinations like those of its predecessor, must be based in part at least on grounds of program service." (at p. 11)

The close relationship of program service and the public interest is further defined by the Commission as follows:

> "As has been noted, the Commission must determine, with respect to each application granted or denied or renewed, whether or

not the program service proposed is 'in the public interest, convenience, and necessity.'

"The Federal Radio Commission was faced with this problem from the very beginning, and in 1928 it laid down a broad definition which may still be cited in part:

> "'Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interests of individual or groups of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this . . . The emphasis should be on the *receiving* of service and the standard of public interest, convenience, or necessity should be construed accordingly. . . . The *entire* listening public within the service area of a station, or of a group of stations in one community, is entitled to service from that station or stations. . . . In a sense a broadcasting station may be regarded as a sort of mouthpiece on the air for the community it serves, over which its public events of general interest, its political campaigns, its election results, its athletic contests, its orchestras and artists, and discussion of its public issues may be broadcast. *If . . . the station performs its duty in furnishing a well rounded program, the rights of the community* have been achieved.' (In re Great Lakes Broadcasting Co., F.R.C. Docket No. 4900; cf.

3rd Annual Report of the F.R.C., pp. 32-36.) (Emphasis supplied)"

The Commission has determined that the carrying of local live programs is one of the most important considerations in determining the adequacy of the station's program service (Blue Book pp. 36-39). "In granting and renewing licenses, the Commission has given repeated and explicit recognition to the need for adequate reflection in programs of local interests, activities and talent." (*ibid.* at p. 37) The courts have supported this position of the Commission. *Courier Post Broadcasting Co. v. F. C. C.*, 104 F. 2d 213, 218 (C. A., D. C.).

A "local live program" was defined by the Commission in Public Notice 95462 dated July 2, 1946 as "any local program which uses live talent exclusively, whether originating in the station's studios or by remote control. Programs furnished to a station by a network or another station, however, are not classified as 'live', but as 'network'. *A program which uses recordings in whole or in part, except in a wholly incidental manner, should not be classified as 'live' but as 'recorded'.* Wire programs, as defined above, should likewise not be classified as 'live'. A recorded program which is a local live program produced by the station and recorded for later broadcasting by the station shall be considered a local live program" (Blue Book, Preface). (Italics supplied)

In *Bamberger Broadcasting Service*, (Docket Nos. 7241, 3, 5, 6, 8 and 7250, FCC) 3 Pike & Fisher, *Radio Regulation* 1069, the Communications Commission preferred an applicant for li-

cense who would provide full television service for the community. The Commission stated that ". . . News Syndicate, upon the showing made, offers greater assurance of establishing *a prompt television service in the area* than does Debs Memorial. It is to be noted in this regard that Debs Memorial would install its equipment in successive stages and that *field pickup facilities for televising remote events would not be acquired until some time after the station goes on the air.*"

The Commission in its Blue Book emphasizes the role of the public in the improvement of station program service and the need for public criticism of station program service:

> "Primary responsibility for the American System of broadcasting rests with the licensee of broadcast stations, including the network organizations. It is to the stations and networks rather than to federal regulation that listeners must primarily turn for improved standards of program service. The Commission, as the licensing agency established by Congress, has a responsibility to consider overall program service in its public interest determinations, but affirmative improvement of program service must be the result primarily of other forces.
>
> "One such force is self-regulation by the industry itself, through its trade associations."
>
> * * *
>
> "Forces outside the broadcasting industry

similarly have a role to play in improved program service."

* * * *

"It is hoped that the facts emerging from this report and the recommendations which follow will be of interest to the groups mentioned. With them rather than with the Commission rests much of the hope for improved broadcasting quality.

"While much of the responsibility for improved program service lies with the broadcasting industry and with the public, the Commission has a statutory responsibility for the public interest, of which it cannot divest itself. The Commission's experience with the detailed review of broadcast renewal applications since April 1945, together with the facts set forth in this report, indicate some current trends in broadcasting which, with reference to licensing procedure, require its particular attention.

"In issuing and in renewing the licenses of broadcast stations the Commission proposes to give particular consideration to four program service factors relevant to the public interest. These are: (1) the carrying of sustaining programs, including network sustaining programs, with particular reference to the retention by licensees of a proper discretion and responsibility for maintaining a well-balanced program structure; (2) *the carrying of local live programs;* (3) the carrying of programs devoted to the dis-

cussion of public issues, and (4) the elimination of advertising excesses." (pp. 54-55)

The concerted activity of publishing the handbill did not contravene—it furthered the public interest in the character and quality of the Company's program service.

The Company had failed to purchase the technical equipment required to televise live programs in the studio or to make pick-ups of local events remote from the studio. Its equipment was available only for the televising of film, kinescope recordings (a special form of motion picture film), and slides.

As late as November 1949, the Company's advertising literature showed that it could produce only film programs and that even announcements from the studio were limited to slide and film (R. 236). The inadequate quality of the television program service, which had commenced in July 1949, was admitted by the Company in advertising literature dated August 1949 which it distributed to the public (R. 238).

These known and admitted facts were published in the handbill which advertised the facts that WBTV's programs were limited to film and that WBTV did not have the proper equipment to allow the listening public to receive "local" programs such as local baseball games, football games and other local events. The handbill also stated that cities like New York, Boston, Philadelphia and Washington received "such" programs nightly and appealed to a sense of civic pride in classing

Charlotte, North Carolina as not inferior to these metropolitan centers.

The handbill did not call for a boycott of either the television station or of stores selling television sets.

The publication could only serve to accelerate whatever program the Company had for securing the equipment needed to provide an adequate television service including local live programs. The public interest could only be advanced by such acceleration.[1]

Yet it was this very publication " in the interest of consumers and the public at large" (R. 16) which was condemned by the Board "in the circumstances of the case" as "hardly less 'indefensible' than acts of physical sabotage". (*id.*) This conclusion is not consistent with the Congressional objectives of this or any other Act, sound considerations of public policy, reason or logic.

The "circumstances" related by the Board in its Decision and Order and in its brief before this Court in support of its conclusion that the concerted activity of publication was "indefensible" are irrelevant to the legal issues in this case.

---

[1] cf. *Address* by Professor Sumner H. Slichter, delivered Oct. 27, 1952 before the American Gas Association, 31 Labor Relations Reporter 5, 13:

> "The American economy needs the contribution which the trade unions are making to it. Even with all the competition and research in industry, enterprises need the additional spur to efficiency that comes from strong pressure for higher wages and better conditions."

Section 7 protects "concerted activities for the purpose of . . . mutual aid or protection." It has been held that concerted activity for the purpose of winning the favor of the public on a non-labor issue in order that the union may acquire the support of public opinion in its labor disputes is protected by Section 7. *National Labor Relations Board v. Peter Cailler Kohler Co.*, 130 F. 2d 503 (C.A. 2). The Court there stated that ". . . a union may subsidize propaganda, distribute broadsides, support political movements and in any other way further its cause or *that of others whom it wishes to win to its side.*" (italics supplied) (*ibid.* at p. 506).

That the Board has overlooked this rule of law is evidenced by the statement in its brief that in the instant case ". . . the normal justification for affording the protection of the Act to employees who disparage their employer i.e. publicizing a labor dispute *in order to persuade the public to enlist its support in the dispute was lacking.*" (italics supplied) (Pet. br. 38)

Respondent therefore submits that such circumstances as: widespread distribution of the handbill away from the picket line (R. 15, Pet. br. 37) and the non-labor subject matter of the handbill (R. 17, Pet. br. 37, 38) do not remove the concerted activity of its publication from the scope of Section 7.

Furthermore, Section 7 guarantees the right of "employees" to engage in "concerted activities". It is not limited to the concerted activities of labor organizations. See *National Labor Relations Board v. Schwartz*, 146 F. 2d 773, 774 (C. A. 5).

Therefore, the fact that the handbill was published in the name of the occupational title of the employees (R. 16, Pet. Br. 37) does not remove the concerted activity from the protection of Section 7. In this connection it should be noted that the term "WBT technicians" was an entirely truthful statement as to the work status of the employees involved in this case. The term "technicians" is a description of the occupation of the employees involved in this proceeding in the same sense as the more widely known terms: "carpenters", "electricians" or "bricklayers". Certainly it cannot be said that the policies of the Labor Management Relations Act of 1947 require all union publications to be issued over the name of the union, its local union number and affiliation. Such a requirement, if constitutionally valid, would be consistent only with a detailed set of minute regulations concerning the procedural practices of union activity. It cannot be reasonably claimed that the Labor Management Relations Act of 1947 purports to establish such regulations in Section 7.

The brief of the Board introduces an additional consideration not mentioned or relied upon in the decision of the Board. The Board now states: "In circumstances like these, an employer would seem plainly (sic) to have the right to discharge employees who seek to prevent him from selling a product *when they are paid to do just the opposite.*" (Pet. Br. 38-39.) This statement in the brief has no support in the record or the facts of this case. The employees involved were manual workers who operated the physical and technical equipment of the Company. They were not em-

ployed in the advertising or sales department. The above reference together with statements in the Board's decision which indicated that Respondent "apprehend[ed]" the loss of advertising revenue view the problems raised by the provisions of Section 7 as limited to the "expectable reaction" of an employer (Pet. br. 16). The rule of law is, however, that if the employees had the right to publish the handbill, the adverse effect upon the private interests of the employer would not serve to defeat the public right granted to the employees. The appropriate test in determining the legal status of the concerted activities of the employees must be based on considerations of public, rather than private, policy. This is particularly the case where, as here, the employer is engaged in the operation of a "public interest" business and the quality of his "product" is an issue of governmental and public concern.

It is respectfully submitted that the enumeration of factors of circumstance in both the decision of the Board and its brief are governed not by considerations of law but by the number of "differences" (Pet. br. 36, fn. 14) between the concerted activities in this case and "the conventional tactics of organized labor." (Pet. br. 36) The brief refers to the handbill as "unlike the *traditional* appeal for public support in a labor dispute" (Pet. br. 39) and endeavors to distinguish the *Peter Cailler Kohler Co.* case, *supra*, on the ground that the publication in that case "was *not dissimilar* from the conventional appeal of a union for public support in a dispute with the employer" (Pet. br. 38, fn. 15). Respondent submits that

the content of the words "concerted activities" as used in Section 7 cannot be limited to the personal views of the members of the Board concerning what constitutes "orthodox" procedure in labor disputes. The very breadth of the language employed in Section 7 shows a contrary intent. Furthermore, the position of the Board would consider unprotected such employees' activities as appearing in rate proceedings in support of the public position rather than that of their employer, employees' expressions in the court of public opinion that their employer's prices are too high or that their employer's rate of conversion to a wartime economy is too slow. Although such activities are not frequent, they have occurred. The public interest would not be advanced—it would be impaired—if the working officers or members of a union could be subject to retaliatory discharge by the employer for such expressions of opinion. This would be the result of the Board's action in the instant case.

The public policy of the United States is to protect freedom of speech. This policy is found in the Constitution, at common law[8] and indeed, in this very Act.

---

[8] The privilege of fair comment on matters of public interest is set forth as follows in Newell, *Slander and Libel*, 4th Ed. "Every person has the right to publish . . . fair and candid criticism, although the author may suffer loss from it. Such a loss the law does not consider an injury, because it is a loss which the party ought to sustain. It is, in short, the loss of fame and profits to which he was never entitled . . . Fair discussion is essen-

The decision of the Board would encourage the suppression of opinion on matters of public interest if employees are the source of that opinion. This is not an essential element of a balanced society. There is no basis for establishing the policy implicit in the Board's decision as a limitation on the scope of Section 7.

For all of the foregoing reasons, it is contended that the concerted activity of publishing the handbill did not contravene any policy of the National Labor Relations Act as amended, or of any other Federal statute. The Board therefore did not have the unlimited discretion to characterize the publication as "indefensible" and remove it from the protection of Section 7.

A fortiori, the Court of Appeals did not commit error by remanding the case to the Board for further proceedings, including determination of

---

tially necessary to the truth of history and the advancement of science" (at p. 521).

"All theatrical and musical performances, flower shows, etc., may be freely criticized provided that the comments be *not malevolent* or flagrantly unjust. The exhibitor, as well as the author and artist, by his appearance as such in public, invites criticism and he cannot complain if the criticism is hostile so long as it is in good faith" (at pp. 550-551).

[6] Sec. 8(c) provides that the "expressing of any views, argument or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

whether the concerted activity was within the scope of Section 7 in accordance with the legal interpretation of that section by the Court of Appeals.

CONCLUSION

It is respectfully submitted that the decision of the court below should be affirmed.

LOUIS SHERMAN,
PHILIP R. COLLINS,
Attorneys for Respondent,

1200 - 15th St. N.W.
Washington 5, D. C.

APPENDIX A

Section 1 of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C., Supp. V, 141, et seq.), provides in pertinent part as follows:

SHORT TITLE AND DECLARATION OF POLICY

Section 1. * * *

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in con-

nection with labor disputes affecting commerce.

The pertinent provisions of the National Labor Relations Act, as amended (Act of July 5, 1935, 49 Stat. 449, 29 U.S.C. 151 et seq., as amended by the Act of June 23, 1947, Public Law 101, 80th Congress, 1st Session and as further amended by the Act of October 22, 1951, Public Law 189, 82nd Congress, 1st Session, 29 U.S.C., Supp. V. 151 et seq.) are as follows:

FINDINGS AND POLICIES

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from ~~or into~~ the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of

association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce

employees in the exercise of the rights guaranteed in section 7;

* * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

* * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. * * *

* * * * * *

(c) * * *If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall

cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to the questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(*f*) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was

alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

APPENDIX B

The pertinent provisions of the Communications Act of 1934, as amended (Act of June 19, 1934, 48 Stat. 1064 et seq., 47 U.S.C. 151 et seq., as amended by the Act of June 5, 1936, 49 Stat. 1475, 37 U.S.C. 307, as amended by the Act of May 20, 1937, 50 Stat. 189, 47 U.S.C. 151 et seq., and as further amended by the Act of July 16, 1952, Public Law 554, 82nd Congress, 2nd Session) are as follows:

PURPOSES

Sec. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States *a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities* at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

* * * * *

DEFINITIONS

Sec. 3. For the purposes of this chapter, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, *pictures*, and sounds of of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

* * * * *

LICENSES

Sec. 307(a) The Commission, if public convenience, interest or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

* * * * *

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed

five years in the case of other licenses, *if the Commission finds that public interest, convenience, and necessity would be served thereby.* * * *

Sec. 308.

* * * * *

(b) * * * The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

* * * * *